Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

No. 00-5250

In The

Supreme Court of the United States

WESLEY AARON SHAFER, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR PETITIONER

DAVID I. BRUCK
Counsel of Record
ROBERT E. LOMINACK
P.O. Box 11744
Columbia, S.C. 29211
(803) 765-1044

WILLIAM N. NETTLES
914 Richland Street
Suite A-102
Columbia, S.C. 29201
(803) 779-9966

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether petitioner's due process rights under *Simmons v. South Carolina*, 512 U.S. 154 (1994), were violated by the trial court's refusal to instruct the sentencing jury that "under South Carolina law, [petitioner] would be ineligible for parole if the jury were to vote for a life sentence," *Ramdass v. Angelone*, 120 S. Ct. 2113, 2119 (2000) (plurality opinion), and by the South Carolina Supreme Court's holding that *Simmons* no longer applies to South Carolina's capital sentencing scheme.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF FACTS	2
A. South Carolina's capital sentencing statute	2
B. Petitioner's offense, pretrial filings, and trial	4
C. The sentencing hearing	9
D. How the state supreme court decided the *Simmons* issue	16
SUMMARY OF THE ARGUMENT	19
ARGUMENT	21
A. South Carolina's declaration that *Simmons v. South Carolina* no longer protects capital defendants in that state is flatly inconsistent with *Simmons*	21
B. The prosecution placed petitioner's future dangerousness in issue	25
CONCLUSION	35
APPENDIX A	
S.C. Code Ann. § 16-3-20 (Supp. 1999)	App. 1
APPENDIX B	
State Law Governing Jury Instructions on Parole Ineligibility in Capital Cases	App. 9

TABLE OF AUTHORITIES

	Page
CASES	
Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994)	19
Bell v. State, 938 S.W.2d 35 (Tex. Crim. App. 1996)	29
California v. Ramos, 463 U.S. 992 (1983)	26
Commonwealth v. Clark, 710 A.2d 31 (Pa. 1998)	21, 22
Commonwealth v. Trivigno, 750 A.2d 243 (Pa. 2000)	27
Johnson v. Texas, 509 U.S. 350 (1993)	29
Jurek v. Texas, 428 U.S. 262 (1976)	30
People v. Simpson, 665 N.E.2d 1228 (Ill. 1996)	19
Pope v. Commonwealth, 360 S.E.2d 352 (Va. 1987)	29
Ramdass v. Angelone, 120 S. Ct. 2113 (2000)	19, 20, 23, 24, 25, 29
Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999)	19
Simmons v. South Carolina, 512 U.S. 154 (1994)	*passim*
Skipper v. South Carolina, 476 U.S. 1 (1986)	28, 29
State v. Locklair, Opinion No. 25161, 2000 WL 978576 (S.C., June 26, 2000)	4
State v. McLaughlin, 462 S.E.2d 1 (N.C. 1995)	19
State v. Norris, 328 S.E.2d 339 (S.C. 1985)	15
State v. Plath, 313 S.E.2d 619 (S.C. 1984)	4
State v. Shafer, 531 S.E.2d 524 (S.C. 2000)	*passim*
State v. Shaw, 255 S.E.2d 799 (S.C. 1979)	4
State v. Southerland, 447 S.E.2d 862 (S.C. 1994)	10, 21

TABLE OF AUTHORITIES – Continued

Page

State v. Starnes, 531 S.E.2d 907 (S.C. 2000).....17, 23

State v. Tucker, 478 S.E.2d 260 (S.C. 1996)..... 29

State v. William Arthur Kelly, Record on Appeal (S.C. Sup. Ct. Docket No. 200066)..... 33

State v. Woomer, 299 S.E.2d 317 (S.C. 1982) 32

State v. Young, 459 S.E.2d 84 (S.C. 1994)..... 28

Stringer v. Black, 503 U.S. 222 (1992) 4

United States v. Flores, 63 F.3d 1342 (5th Cir. 1995) ..19, 23

Yarbrough v. Commonwealth, 519 S.E.2d 602 (Va. 1999)..... 21

Zant v. Stephens, 462 U.S. 862 (1983) 4

STATUTES

21 U.S.C. § 848(e) 23

21 U.S.C. § 848(k) 23

28 U.S.C. § 1257(a) 1

S.C. Code Ann. § 16-3-10 (1985) 2

S.C. Code Ann. § 16-3-20 (Supp. 1999) 2, 14, 15, 17

S.C. Code Ann. § 16-3-20(A) (Supp. 1999) 3, 11, 12, 14

S.C. Code Ann. § 16-3-20(B) (Supp. 1999) 3

S.C. Code Ann. § 16-3-20(C) (Supp. 1999) ...3, 4, 17, 22

S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e) (Supp. 1999)..... 6

S.C. Code Ann. § 17-25-45 (Supp. 1999)..... 17

CITATION TO OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported as *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000), and is reprinted in the Joint Appendix at 254-78. The order of the South Carolina Supreme Court granting a stay of execution pending the disposition of the petition for writ of certiorari is unreported, and is reprinted in the Joint Appendix at 279-80. The order of this Court granting the petition for writ of certiorari, limited to the first question presented by the petition, is reprinted in the Joint Appendix at 281.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on May 8, 2000. The petition for writ of certiorari was filed on July 14, 2000, and granted on September 26, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law. . . . "

2. It also involves S.C. Code Ann. § 16-3-20 (Supp. 1999), which code section is reprinted *infra* at App. 1-8.

STATEMENT OF FACTS

A. South Carolina's capital sentencing statutes

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that when a capital defendant's future dangerousness is at issue, due process entitles him to inform the sentencing jury that state law precludes his release on parole from a sentence of life imprisonment. About a year after *Simmons*, the South Carolina legislature abolished parole for all convicted murderers. Act No. 83, § 10, 1995 S.C. Acts 557, *codified as* S.C. Code Ann. § 16-3-20 (Supp. 1999), *infra*, App. 1-8. As thus amended, South Carolina's capital sentencing scheme provides that:

- The death penalty is available as a punishment for any murder (defined as "the killing of any person with malice aforethought," S.C. Code Ann. § 16-3-10 (1985)), so long as the prosecution files pretrial notice of its intention to seek the death penalty, and the sentencing jury finds the existence of at least one statutory aggravating circumstance.

- Where the state seeks the death penalty and the sentencing jury finds the existence of a statutory aggravating factor, the only two sentences available to the jury

are death and life imprisonment without eligibility for parole or any other means of release.[1]

- If the jury does *not* find any statutory aggravating circumstance to exist, the trial judge is then required, without further participation by the jury, to impose a sentence ranging from a minimum of 30 years to a maximum of life imprisonment. S.C. Code Ann. § 16-3-20(C).

- In addition to the evidence supporting the statutory death-eligibility factors, the prosecution may introduce evidence of a wide range of nonstatutory aggravating factors – including the defendant's bad or violent character, prior criminal behavior, and lack of potential for rehabilitation – provided the prosecution furnishes the defendant with written notice of such evidence prior to trial. S.C. Code Ann. § 16-3-20(B).

- After finding a statutory aggravating circumstance, the jury may consider all nonstatutory aggravating factors in deciding whether to impose the death penalty, but the jury is provided with no document identifying such nonstatutory factors.

- Before the jury may impose either life imprisonment or the death penalty, all 12 jurors must identify in

---

[1] S.C. Code Ann. § 16-3-20(A) provides,

> For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section.

writing the statutory aggravating circumstance or circumstances they found to exist beyond a reasonable doubt, S.C. Code Ann. § 16-3-20(C), but no jury findings of any kind are required with respect to nonstatutory aggravating factors.[2]

B. Petitioner's offense, pretrial filings, and trial.

The 1995 no-parole legislation went into effect on January 1, 1996. The following year, petitioner, then 18 years old, shot and killed a convenience store operator during a robbery attempt. The South Carolina Supreme Court summarized the facts of the crime as follows:

> Around 11:30 p.m. on April 12, 1997, appellant and Justin Porter drove to the Hot Spot, a convenience store, in Porter's truck. Appellant and

---

[2] "South Carolina's death penalty sentencing scheme 'was patterned after the death penalty statutes of . . . Georgia,' " *State v. Locklair*, Opinion No. 25161, 2000 WL 978576 (S.C., June 26, 2000), *quoting State v. Shaw*, 255 S.E.2d 799, 802 (S.C. 1979), and is thus a "nonweighing" scheme. *See Stringer v. Black*, 503 U.S. 222, 231-32 (1992). Under such statutes, death eligibility is established by proof of a single statutory aggravating circumstance, S.C. Code Ann. § 16-3-20(C) (Supp. 1999), and the sentencing jury is then authorized at the "selection" stage to consider all facets of the crime and of the defendant's character and prior record in deciding whether to impose the death penalty or life imprisonment. *State v. Shaw*, 255 S.E.2d at 808; *State v. Plath*, 313 S.E.2d 619, 623 (S.C. 1984); *see also Zant v. Stephens*, 462 U.S. 862, 872 (1983) (" 'In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.' " (quoting from Georgia Supreme Court's description of Georgia statute)).

> Porter entered the store. When they returned to the truck, Porter, the driver, spun the back tires of the vehicle and appellant, using his father's gun and bullets he purchased earlier, fired four or five shots from the passenger window as they drove away.
>
> At approximately 1:00 a.m., appellant, Porter, and Adam Mullinax returned to the Hot Spot. Witnesses left the Hot Spot because they suspected trouble.
>
> Appellant, Porter, and Mullinax entered the Hot Spot. Mullinax went into the bathroom then returned to the truck. Appellant and Porter also went into the store, then stood outside the Hot Spot for a few minutes. While Broome was away from the cash register, Porter entered the Hot Spot. He tried to open the cash register but was unsuccessful. He returned outside.
>
> Porter and appellant entered the store again. Broome had returned to the register booth. Appellant went to the checkout counter and shot Broome from several feet away. Broome fell to the floor. Appellant walked to another side of the register, fumbled with the gun, leaned over the register counter, and shot Broome a second time. [FN. 3]. Appellant and Porter's attempt to open the cash register failed. Appellant and Porter left. There is no evidence appellant or Porter asked Broome for money before the shooting.
>
> FN3. Appellant waited eight seconds before firing the second shot.
>
> Three young women arrived as appellant and Porter fled the Hot Spot and jumped into the truck. One of the women ran into the store,

found Broome on the floor, and telephoned for emergency services. When the police arrived, Broome was still breathing. He had been shot twice in the head. [FN4] Broome died at the hospital.

> FN4. All the events inside the Hot Spot were recorded on the store's security camera.

Appellant wrapped Mullinax's shirt around the gun and initially hid it in the woods. He hid his own shirt and Porter's shirt elsewhere. Twelve hours after the shooting, appellant told an employee at another convenience store he was going to the park to shoot basketball.

After his arrest, an investigator asked appellant had Broome done anything to cause appellant to shoot. Appellant responded: "No. We were sitting around in the woods talking about what we were going to do with him, and I'm the one that had the gun, and I guess I just snapped."

JA 255-57; 531 S.E.2d at 526-27.

A month later, a Union County grand jury indicted petitioner for murder, attempted armed robbery and conspiracy, JA 2-4, and the state promptly served notice of its intent to seek the death penalty. JA 4-5. The notice listed two statutory aggravating circumstances – armed robbery and larceny while armed with a deadly weapon – which the state intended to prove in order to establish petitioner's eligibility for the death penalty. *Id.*; S.C. Code Ann. § 16-3-20(C)(a)(1)(d), (e) (Supp. 1999). Later, pursuant to a statutory requirement that the state "inform[ ] the defendant in writing prior to the trial" of its evidence

in aggravation of punishment, S.C. Code Ann. § 16-3-20(B), the prosecution also served a document advising petitioner that the state intended to introduce, *inter alia*,

- "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm as an adult and a juvenile," JA 6,
- "evidence . . . as to the Defendant's character and conduct while incarcerated in jails and/or prisons as an adult and a juvenile . . . " JA 7,
- "evidence . . . relating to his release or parole from jails and/or prisons as an adult and a juvenile; opinions as to the Defendant's character, propensity for violence and unlawful conduct, disregard for peace and good order and to commit such acts in the future." JA 8.

These future dangerousness allegations did not fall within any statutory aggravating circumstance under South Carolina law. However, South Carolina prosecutors often present evidence calculated to persuade juries of capital defendants' future dangerousness, because "[a]lthough South Carolina statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons*, 512 U.S. at 162-63 (plurality opinion).

The first reference to the issue of parole ineligibility at petitioner's trial occurred just prior to the start of jury selection, when the state successfully opposed defense counsel's request that the court describe the alternative to

a death sentence to prospective jurors as "life imprisonment without possibility of parole." JA 10-11. Urging the trial court to refrain from any references to life without parole during jury selection, the prosecutor stated,

> I think the issue of whether or not life is without parole or what should be told to the jury in that regard should be handled at the close of the case per the judge's instructions. It would partially be based on *Simmons*, and whether or not they made a dangerousness argument, and based on that I would request that you use the [jury] questionnaire that has been used in the past.

JA 11. The trial judge agreed, indicating his belief that the necessity of crafting jury instructions concerning the meaning of life imprisonment "is limited to the 12 that decide," and such instructions were unnecessary at the jury selection phase of the proceedings. *Id.*

The prosecution's next successful effort to keep the jury from learning about the non-existence of parole for convicted murderers came during the state's case in the guilt-or-innocence phase of petitioner's trial. After the direct testimony of Joseph Mullinax, an accomplice in the murder who was testifying for the prosecution, the prosecutor moved outside the jury's presence that defense counsel be prohibited from eliciting on cross-examination that the witness was facing a potential sentence of life imprisonment without parole for his role in the murder. The state argued that such cross-examination of the accomplice would "educate the jury as to the non-existence of parole eligibility." JA 20-21. After some discussion, the defense agreed not to question the witness about the unavailability of parole, and ultimately waived cross-examination altogether. JA 23.

C. The sentencing hearing

The jury convicted appellant of murder, attempted armed robbery and conspiracy. At the capital sentencing hearing that followed, the prosecution followed through on its pretrial notice that it would present evidence "as to the Defendant's . . . propensity to commit . . . acts of bodily harm as an adult and a juvenile." The future dangerousness evidence consisted of testimony by law enforcement and jail personnel concerning petitioner's criminal record and his allegedly defiant and assaultive behavior in pretrial detention. Through these witnesses, the state sought to establish the following facts:

- at age 17, petitioner was convicted of burglary and criminal sexual conduct, after he and some friends confessed to having sex with two 12-year-old girls in an unoccupied house, JA 32-37;

- after receiving a probationary sentence for his burglary and criminal sexual conduct convictions and being assigned to an "intensive" probation agent responsible for handling "clients of high risk," JA 71, petitioner violated probation by being rearrested for burglary and driving under suspension, by twice testing positive for marijuana, and by failing to report both to his probation officer and for court-ordered sex offender counseling, JA 72-73, 78-79;

- while awaiting trial for capital murder, petitioner was charged with assaulting a female staff member at the county jail after he became enraged and verbally abusive because she had terminated the inmates' telephone calls, JA 54-58;

- petitioner was also charged with possession of contraband in the jail for illegally possessing and smoking cigarettes, JA 66-68;

- that on the night of his arrest, petitioner asked a jailer whether his father would get his pistol back after it had been seized as the murder weapon, JA 89-90; and
- that petitioner acted like the murder "didn't even bother him" when discussing it with a fellow jail inmate shortly after his arrest. JA 81-85.

Petitioner's mitigation evidence consisted primarily of testimony concerning the physical and emotional abuse he had suffered as a small child and as an adolescent. R. 1578-81, 1584-95, 1598-99. He also introduced expert psychological testimony to the effect that the unrelenting mental and physical abuse he endured over the course of his childhood had left him traumatized, chronically depressed, and at risk for drug abuse and explosive outbursts of aggression. JA 99-107, R. 1711.

At a charge conference near the end of the defense case in mitigation, the prosecutor argued that petitioner was not entitled to a *Simmons* instruction on parole ineligibility because, as in *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994), the prosecution had not "made future dangerousness an issue in this case." JA 160-61. The prosecutor further requested, for the same reason, that the judge "prevent the defense from arguing in their closing argument anything to the effect that he will never get out of prison or anything of this order." R. 1818. Defense counsel protested that the prosecution had already presented evidence of petitioner's assaultive and lawless behavior in jail after his arrest, and urged that the prosecution should not be permitted to evade the *Simmons* rule merely by omitting future dangerousness from its jury

argument after introducing evidence of future dangerousness in its case-in-chief. JA 161-62. In response, the prosecutor insisted that the state's evidence relating to petitioner's assault on a jail guard was not evidence of his future dangerousness:

> Your Honor, he was charged with simple assault, not assault and battery. And, second, we put that in for two reasons, to show his character and to show his adaptability to prison, not future dangerousness. Nobody has argued future dangerousness or said that he might do this again in the future, and the state doesn't intend to in its closing argument.

JA 162-63. After further discussion, the trial judge ruled that the state had not yet "argued" future dangerousness as a sentencing consideration, and unless it did so, he would not charge the jury concerning petitioner's parole ineligibility. JA 164.

Defense counsel next requested that he be permitted to read the relevant portion of S.C. Code Ann. § 16-3-20(A) to the jury. JA 164-65. That code section provides:

> If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt . . . and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. *No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct*

> *credits, or any other credits that would reduce the mandatory life imprisonment required by this section.*

(emphasis added). With the state's consent, the trial court eventually agreed to charge that portion of the statute providing that " 'life imprisonment' means until death of the offender." JA 166-69. However, the court denied defense counsel's request that he be permitted to read the last sentence of the above-quoted section of Code § 16-3-20(A) to the jury in the course of argument in order to make clear that "life imprisonment" also excluded all possibility of parole. JA 164-65.

Having thus ensured that the jury would not be "educate[d] as to the non-existence of parole eligibility," JA 21, the prosecutor ended his closing argument with a dramatic evocation of the murder scene which wove together his belief in the alleged deterrent value of capital punishment with the witnesses' expressed fear, after discovering the dying victim, that the killers "might come back." The prosecutor stated:

> Ladies and gentlemen, one of the scariest things . . . about . . . the video where we saw the cash tape, the horror and all of the sound, do you remember the girls that came in and when Jamie Palmer was saying, "Oh God; oh, God; oh, God, Ray," and the girls were running in and out, we've got to go, we've got to go, and I tell you what, I've listened to it, you've listened to it, and you will have a chance again, but what is really etched in my mind is Monica Inman. Remember Jamie picks up that phone and she's calling 911, and Monica Inman says, "Come on,

> Jamie, *they might come back, they might come back.*"
>
> Ladies and gentlemen, you are the conscience of this community, and your verdict does send a message to Union County, to the state. So the next time somebody with a pistol thinks about loading up, coming across that river to Lockhart, over to Jonesville or out to Buffalo or anywhere in this county, *and they might come back, they might come back,* they will remember this day, and they will remember this jury, and they will remember this verdict.

JA 185-86 (emphasis added).

At the conclusion of the argument, defense counsel renewed petitioner's request for a *Simmons* no-parole instruction on the grounds that the prosecutor's dramatic and repeated evocation of the witnesses' fear that the murderers "might come back" had again raised the issue of petitioner's future dangerousness. JA 188-92. The prosecutor continued to deny having suggested that petitioner would be dangerous in the future, insisting that his argument was intended only to urge the general deterrent effect of a death sentence in this case on other would-be murderers. The trial judge denied petitioner's renewed request for a *Simmons* instruction, stating that the prosecutor's jury argument "comes close" to a future-dangerousness claim, but that it had not "crossed the line." JA 191-92.

In keeping with this ruling, neither defense counsel nor the trial judge ever informed the jury at any point in the proceedings that South Carolina law prohibits parole or other form of early release for a defendant who has

been sentenced to life imprisonment for murder. Defense counsel did make rhetorical assertions that petitioner would "die in prison," JA 192, 198, and that he would be put in prison "until he is dead." JA 194. Likewise, the judge's instructions to the jury included the statutory provision that "life imprisonment means incarceration of the defendant until his death." JA 209. However, after three-and-a-half hours of deliberation, the jury sent out two written questions that showed it had not interpreted defense counsel's arguments and the court's "incarceration until death" instruction as necessarily precluding the possibility of parole:

> 1. Is there any remote chance for someone convicted of murder to be eligable [sic] for parole?
>
> 2. Under what conditions would someone convicted for murder be eligable [sic]?

JA 222, 253. There followed more than forty-five minutes of discussion between the court and counsel while the jury waited for an answer to its questions. JA 222-242. The state continued to insist that the jury should not be informed of the unavailability of parole because "future dangerousness has not been argued as an issue." JA 223. Petitioner's counsel renewed his earlier request that the court read to the jury those portions of S.C. Code Ann. § 16-3-20(A) immediately preceding and following the single sentence already charged. JA 226. The court denied petitioner's request and eventually decided to re-instruct the jury that under S.C. Code Ann. § 16-3-20 "life imprisonment means until the death of the offender." JA 229. At this juncture the prosecutor read to the judge the holding of a pre-*Simmons* decision of the South Carolina

Supreme Court, *State v. Norris*, 328 S.E.2d 339, 344 (S.C. 1985), to the effect that " '[w]hen the issue [of parole] is raised, the judge should instruct the jury that it shall not consider parole eligibility in reaching its decision, and that the terms "life imprisonment" and "death sentence" should be understood in their plain and ordinary meaning.' " JA 234. The trial judge acknowledged that the applicability of *Norris* was complicated by the intervening amendments to South Carolina's capital sentencing statute, but that earlier decisions such as *Norris* "are all I've got to go on." JA 236. Ultimately, the judge acceded to the state's request to include a further instruction to the jury that "parole eligibility is not for your consideration." JA 236. Defense counsel urged the judge to delete the explicit reference to parole eligibility, pointing out that it implied parole *was* a possibility, when in fact it was not. JA 236, 239. However, the trial judge adhered to his ruling, and after nearly an hour's wait, the jury was summoned back into the courtroom and re-instructed as follows:

> Now, your questions were two. First, "Is there any remote chance for someone convicted of murder to be eligible for parole?" And the second is, "Under what conditions would someone convicted for murder be eligible?"
>
> I answer that in this fashion. Your consideration is restricted to what sentence to recommend. I will remind you that what you recommend is what I will impose as trial judge.
>
> Section 16-3-20 of our Code of Laws as applies to this case in the process we're in, states that, "for the purposes of this section life

imprisonment means until the death of the offender."

Parole eligibility or ineligibility is not for your consideration.

JA 239-40.

An hour and twenty minutes after receiving this instruction, the jury returned with a death sentence. JA 241-43. When the jury's sentencing decision was announced, defense counsel requested, in light of the jury's parole questions, that the court poll the jury on "the specific question whether parole eligibility, their belief therein, gave rise to their verdict." JA 248. Counsel also requested the court to make an inquiry of a member of the trial jury who had indicated during jury selection that she worked for the parole board, R. 389, to determine whether she had "expressed personal knowledge outside of the evidence and the law given." JA 248. The trial judge denied both requests, dismissed the jury, and sentenced petitioner to death. JA 248-54.

D. How the state supreme court decided the *Simmons* issue.

On direct appeal to the South Carolina Supreme Court, petitioner renewed his argument that the federal due process rule of *Simmons v. South Carolina* entitled him to advise the jury of the unavailability of parole had he been sentenced to life imprisonment. *State v. Shafer*, Brief of Appellant at 24-30; Reply Brief at 4-16. In response, the state advanced a wholly new justification for the trial judge's refusal to give a *Simmons* instruction. Pointing out that under South Carolina's amended sentencing statute,

the trial judge can impose a less-than-life sentence for murder if the jury finds no statutory aggravating circumstance, the state insisted that the South Carolina statute no longer satisfies the first, "life-without-parole" requirement of *Simmons*. As a result, according to the state, *Simmons* no longer applied to *any* South Carolina capital proceeding conducted under the post-1995 statute. *State v. Shafer*, Brief of Respondent at 21-29.[3]

With one justice dissenting, the South Carolina Supreme Court agreed with this argument, and on that basis upheld the trial judge's refusal to give a *Simmons* instruction. In petitioner's case and in a companion case decided the same day, *State v. Starnes*, 531 S.E.2d 907, 915-17 (S.C. 2000), the state supreme court held *Simmons* to be inapplicable to post-1995 South Carolina capital cases "because life imprisonment is not the only legally available sentence alternative to death." *State v. Shafer*, 531 S.E.2d 524, 528 (S.C. 2000), JA 260. In its *Starnes* opinion, to which the *Shafer* opinion referred, the state court quoted at length from the amended S.C. Code Ann. § 16-3-20, emphasizing those provisions that authorize sentences of as little as thirty years if (and only if) "no aggravating circumstance is found." *Starnes, supra*, 531 S.E.2d at 916. The court did not, however, include or refer to the next section, § 16-3-20(C), which provides in relevant part:

---

[3] The state did acknowledge that a *Simmons* instruction might still be required where the prosecution had exercised its discretion to invoke a recidivist statute that mandates life sentences for certain second or third felony convictions. *State v. Shafer*, Brief of Respondent at 29 (citing S.C. Code Ann. § 17-25-45 (Supp. 1999)).

> Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A) . . . If the jury does not unanimously find any statutory aggravating circumstance or circumstances beyond a reasonable doubt, *it shall not make a sentencing recommendation.*

(emphasis added). To petitioner's argument that under the portion of § 16-3-20(C) quoted above, a South Carolina jury does not even deliberate on the issue of sentence unless and until it has found an aggravating circumstance – at which point the only alternatives are indeed death and life without parole – the state supreme court responded:

> Appellant argues *Simmons* mandates a charge on parole ineligibility when the State argues future dangerousness and the *jury's sentencing recommendation* is limited to death or life without the possibility of parole, even though some other sentence is available. We do not read *Simmons* so narrowly. By its own terms, *Simmons* requires the trial judge instruct the jury the defendant is parole ineligible only if no other sentence than death, other than life without the possibility of parole, is *legally available* to the defendant. *Simmons*, U.S. at 178 (O'Connor, J., concurring) ("[a]lthough the only alternative sentence to death under state law was life imprisonment without the possibility of parole . . . ".) (emphasis added).

JA 260-61. Because a sentence of as little as thirty years could be imposed in cases where the jury failed to find

the defendant death-eligible and thereby passed sentencing responsibility to the judge, the state court majority held *Simmons* inapplicable to the amended South Carolina sentencing scheme. In support of this holding, the court cited a series of state and federal cases holding *Simmons* inapplicable where, if the jury declined to impose the death penalty, the defendant would have been eligible either for parole, *Ramdass v. Angelone*, 187 F.3d 396 (4th Cir. 1999); *Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994); *State v. McLaughlin*, 462 S.E.2d 1 (N.C. 1995), or for a less-than-life sentence to be selected by the court. *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995); *People v. Simpson*, 665 N.E.2d 1228 (Ill. 1996). JA 260-62.

On June 6, 2000, the South Carolina Supreme Court stayed petitioner's execution to allow the filing of a petition for writ of certiorari in this Court. JA 279-80. On September 26, the Court granted the petition, limited to the question of whether the denial of an instruction on life without parole violated due process and *Simmons v. South Carolina*. JA 281.

SUMMARY OF THE ARGUMENT

1. The South Carolina Supreme Court's declaration that *Simmons v. South Carolina*, 512 U.S. 154 (1994), no longer applies to South Carolina's capital sentencing statute is directly contrary to this Court's recent decision in *Ramdass v. Angelone*, 120 S. Ct. 2113 (2000), and to *Simmons* itself. The fact that South Carolina trial judges now have the power to impose a sentence of less than life

without parole if the jury does not find a statutory aggravating circumstance is irrelevant for two reasons. First, any South Carolina jury with the legal authority to impose the death penalty can also impose a life-without-parole sentence (and no other). And second, a jury that cannot impose the death penalty for lack of a statutory aggravating factor may also not impose – or even consider – any other sentence. Regardless of the availability of lesser sentences for non-death-eligible defendants, it remains just as true under the current South Carolina sentencing scheme as it was in *Simmons* itself that "as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Ramdass, supra,* at 2121 (plurality opinion).

2. The state's evidence and jury argument placed petitioner's future dangerousness at issue, and entitled him to the protection of the *Simmons* rule. The evidence bearing on future dangerousness included the facts of the crime itself, petitioner's prior criminal record, his poor performance as a "high-risk" probationer, his apparent lack of remorse for the murder, and his violent and impulsive misbehavior in jail. Prior to trial, the state forthrightly characterized much of this case in aggravation as "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm." JA 6. It later relabeled this same evidence as concerned with petitioner's "character," rather than to his "dangerousness," but this semantic change was merely a transparent effort to avoid a *Simmons* instruction. The state's introduction of detailed evidence concerning petitioner's violations of probation was especially likely to raise the specter of parole release, and the prosecutor's

repeated evocation of witnesses' frightened cries that the killers "might come back" was calculated to underscore the danger that petitioner still posed. South Carolina law and the trial court's instructions both permitted the jury to draw adverse inferences about petitioner's future dangerousness from all of this evidence and argument, and the jury's parole questions strongly imply that the jury did just that. Under these circumstances, there is no merit to the state's claim that future dangerousness was not at issue at petitioner's sentencing hearing merely because the prosecutor was careful to avoid the word "dangerousness."

ARGUMENT

A. South Carolina's declaration that *Simmons v. South Carolina* no longer protects capital defendants in that state is flatly inconsistent with *Simmons*.

At the time of the South Carolina Supreme Court's decision in this case, South Carolina was one of only two life-without-parole jurisdictions that still refused to inform capital sentencing juries of the non-existence of parole except to the extent required by *Simmons*. *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994) (*Simmons* instruction not required because state did not rely on future dangerousness), *vacated on other grounds*, 524 S.E.2d 833 (S.C. 1999); *Commonwealth v. Clark* 710 A.2d 31, 35-37 (Pa. 1998) (same). *But see Yarbrough v. Commonwealth*, 519 S.E.2d 602 (Va. 1999) (requiring no-parole instructions

even where future dangerousness not at issue); *Commonwealth v. Clark*, *supra*, 710 A.2d at 43-44 (three members of seven-member Pennsylvania Supreme Court would mandate *Simmons* instructions in all cases).[4] With its decision here, South Carolina has attempted to extend this refusal beyond what *Simmons* and due process permit.

The South Carolina Supreme Court's error in this case is plain. The state court overlooked the fact that if the jury fails to find any statutory aggravating circumstance, S.C. Code Ann. § 16-3-20(C) provides that the jury "shall not make a sentencing recommendation" at all, in which case the selection of a noncapital sentence becomes the sole province of the trial judge. Under the current South Carolina sentencing scheme – and under the jury's instructions in this case – the jury does not even engage in sentencing deliberations unless and until it has established the defendant's death-eligibility by finding at least one statutory aggravating circumstance. And once that threshold is crossed, it is undeniably true, as the trial judge explained to petitioner's jury, that two and only two possible sentences exist: death and life imprisonment.[5] What petitioner's jury did *not* know, even after

---

[4] The law of the nation's capital sentencing jurisdictions governing whether and how trial judges should inform capital sentencing juries of restrictions on parole release is set forth *infra* at App. 9-12.

[5] The trial judge told the jury, "There are two recommendations that you are to consider in this case. One is the death penalty, the other is life imprisonment." App. 199. "Once you have unanimously found . . . an aggravated [sic] circumstance, you then further deliberate, and determine whether or not Wesley Aaron Shafer should be sentence[d] to life imprisonment or death." App. 202. *See also* App. 212-14.

inquiring about the subject, was that "life imprisonment" means life imprisonment without possibility of parole. Instead, just as in *Simmons*, the trial judge "actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact." *Id.*, 512 U.S. at 170 (plurality opinion).

United States v. Flores, 63 F.3d 1342 (5th Cir. 1995), on which the state supreme court relied, is inapposite. *Flores* involved a federal murder statute, 21 U.S.C. § 848(e), which provides for sentences ranging from twenty years to death. The jury's only sentencing function under § 848 is to decide whether or not to impose the death penalty: if it does not, the judge selects a non-capital sentence. 21 U.S.C. § 848(k). While the facts of *Flores* made any less-than-life sentence highly unlikely, federal law did not *preclude* such a sentence: consequently, the Fifth Circuit determined that *Simmons* did not apply. *See* 63 F.3d at 1368; *accord Ramdass v. Angelone*, 120 S. Ct. 2113 (2000). In contrast, South Carolina's sentencing system requires the jury to choose *between* life and death, and it *does* preclude any sentence less than life without parole once the jury's finding of death-eligibility triggers its sentencing role. Because state law provides no alternative but life without parole for any jury that actually considers whether to sentence a defendant to death, the *Simmons* requirement of a life-without-parole alternative to the death penalty is now satisfied in *every* South Carolina capital case, including this one.

If *Simmons* itself could have left any doubt on this point, *Ramdass v. Angelone* removes it. In *Ramdass*, decided just after the South Carolina Supreme Court's decisions in *Shafer* and *Starnes*, Justice Kennedy explained for a four-

member plurality of the Court that "[t]he premise of the *Simmons* case was that, under South Carolina law, the capital defendant would be ineligible for parole if the jury were to vote for a life sentence." 120 S. Ct. at 2119. Later, Justice Kennedy elaborated on this point, observing that under *Simmons*, a "parole-ineligibility instruction is required only when, assuming the jury fixes the sentence at life, the defendant is ineligible for parole under state law." *Id.* at 2120. And finally, Justice Kennedy's plurality opinion stressed that "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 2121.

These descriptions of the scope of *Simmons* clearly encompass the amended South Carolina statute under which petitioner was sentenced. Petitioner's jury was given a life-imprisonment alternative and was required (after finding an aggravating factor) to impose either life or death. The fact that the trial judge might have imposed a lesser sentence if the jury did *not* find a statutory aggravating circumstance is irrelevant, both because any South Carolina jury with the legal authority to impose the death penalty can also impose a life-without-parole sentence (and no other sentence), and because a jury that cannot impose the death penalty for lack of a statutory aggravating factor may also not impose – or even consider – any other sentence. Thus what was true in *Simmons* is just as true here – the only non-capital sentence available to the *sentencing* jury was life without parole.[6]

---

[6] Moreover, even if a less-than-life option were available to the sentencing jury, *Simmons* would still apply. As the above-quoted statements from Justice Kennedy's *Ramdass* opinion make clear, the relevant question is *whether state law permits the jury to impose life without parole* upon an allegedly dangerous capital murderer. It does not matter whether a state makes such a sentence the *only* non-capital alternative for a death-eligible defendant (as South Carolina does), so long as life without parole is *one of* the options that the sentencing jury may select. If it is, the due process rationale of *Simmons* applies with undiminished force, and bars the state from concealing from the sentencing jury its life-without-parole alternative.

B. The prosecution placed petitioner's future dangerousness in issue.

The South Carolina Supreme Court did not address the state's alternative rationale for denying a *Simmons* instruction, i.e., that the prosecution did not "argue" future dangerousness as a nonstatutory aggravating factor. Since the state renewed this argument as an alternative reason to deny certiorari, *Shafer v. South Carolina*, Brief in Opposition to Petition for Writ of Certiorari at 29-33, and will likely do so again in its brief in this Court, petitioner will address it here.

As is often the case, the state's evidence bearing on future dangerousness centered on the facts of the crime itself, petitioner's prior criminal record, his violations of probation and his misbehavior in confinement. Before trial (and apparently before considering the *Simmons* implications of its evidence), the state forthrightly characterized much of its case in aggravation as "evidence as to the Defendant's . . . propensity to commit or to attempt to commit acts of violence or bodily harm." JA 6. The state later re-characterized this evidence as relating to petitioner's "character" rather than to his "dangerousness" in

a transparent effort to avoid a *Simmons* instruction. But the evidence itself remained the same. Thus the state introduced petitioner's prior record for burglary and criminal sexual conduct, his failure as a "high-risk" probationer, and testimony that he had threatened and assaulted a female jail employee while awaiting trial.

While this evidence was arguably relevant to more than one issue, future dangerousness was undeniably *one* of the issues suggested by evidence that petitioner committed sexual crimes against a 12-year-old-girl, and that he was prone to angry and impulsive outbursts of aggressive behavior. *See California v. Ramos*, 463 U.S. 992, 1006 n.20 (1983) ("[A] . . . jury's evaluation of the defendant's future dangerousness may rest on lay testimony about the defendant's character and background and the inferences to be drawn therefrom."). After considering petitioner's prior criminal record, his poor record on probation, his angry assault on a jail officer, and the extreme impulsiveness revealed by the videotape of the murder itself, the jury likely found itself wondering (and discussing) whether the risks of allowing petitioner to live were unacceptably great. Would he prove similarly impulsive and angry in the future? Would he strike again, whether in prison or, if released, in society? And the fact that the jury found it necessary to ask the judge whether petitioner would ever be eligible for parole further indicates that the jurors did indeed interpret this evidence as tending to show his future dangerousness. *See California v. Ramos*, 463 U.S. 992, 1003 (1983) (noting that an instruction inviting the jury to consider the possibility of a capital defendant's eventual release on parole "focuses

the jury on the defendant's probable future dangerousness"); *Commonwealth v. Trivigno*, 750 A.2d 243, 254 (Pa. 2000) (jury's questions about parole and consecutive sentencing show that future dangerousness was a factor in deliberations). Given the evidence, the prosecutor's argument, and the jury's parole questions, petitioner's future behavior and his potential for future dangerousness were plainly among the factors weighed by the jury as it deliberated life and death.

The state may contend that the evidence of petitioner's assaultive misconduct in jail went only to the issue of his likely behavior *in confinement*, and thus did not entitle him to a no-parole instruction. This argument not only applies to only a small part of the state's future dangerousness case, but is without merit even as far as it goes. The fact that a murderer is violent and assaultive in pretrial confinement may indeed suggest that his future prison behavior will be bad, but it also implies that he will be dangerous anywhere, inside prison or out, unless executed. Indeed, a pretrial detainee's violent behavior within the restrictive setting of a county jail provides an especially powerful reason to expect even more violent behavior should he ever be released into society. The jail evidence introduced in this case tended to prove petitioner's future dangerousness both in prison and outside it, and the jury was reasonably likely to draw both inferences.

More broadly, the state may claim that its evidence in aggravation concerned only petitioner's "character" rather than his likely future behavior. Although the South Carolina Supreme Court has distinguished between bad character and dangerousness in prior cases, *see, e.g., State*

v. Young, 459 S.E.2d 84, 87 n.4 (S.C. 1994), in this case such a distinction is meaningless. When the prosecution seeks to prove that a convicted murderer has a bad prior record, cannot be rehabilitated, lacks remorse, and behaves violently in jail, it is trying to prove that his character is one of persistent and violent criminality – which is to say, that he is dangerous and will remain so. The defendant's right to inform the jury that he will never be released from prison does not depend on whether this portrayal is labeled "dangerousness" or "character," because in this setting the two terms mean the same thing.[7]

In states where dangerousness is a formal statutory factor, prosecutors generally rely on precisely the type of evidence that the state introduced here. Courts in both Virginia and Texas – states where future dangerousness is

---

[7] South Carolina's proffered distinction between a convicted murderer's bad character and his future dangerousness recalls an analogous claim that this Court rejected in *Skipper v. South Carolina*, 476 U.S. 1 (1986). There, the South Carolina attorney general insisted that state law permitted capital defendants to offer mitigating evidence of their past good conduct in prison, while barring only "irrelevant" evidence of their future adaptability to prison life. The Court found "[t]he State's proposed distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct in prison . . . [to be] elusive . . . [because] a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7. In much the same way, evidence of a defendant's explosively violent and remorseless character "is by its very nature" evidence of his future dangerousness.

a statutory factor – have held that the facts of the capital murder itself may alone support a finding of dangerousness beyond a reasonable doubt. *See, e.g., Pope v. Commonwealth*, 360 S.E.2d 352, 361 (Va. 1987), *Bell v. State*, 938 S.W.2d 35, 42 (Tex. Crim. App. 1996). In addition, given that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing," *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986), prosecutors usually present any available evidence of prior convictions and other violent or anti-social conduct to prove future dangerousness. *See e.g., Johnson v. Texas*, 509 U.S. 350, 355 (1993) (state proved future dangerousness by introducing 19-year-old offender's prior crimes); *State v. Tucker*, 478 S.E.2d 260, 269-70 (S.C. 1996) (recognizing that evidence of past criminal behavior is highly relevant to both character and future dangerousness of convicted murderer). Likewise, in this Court's most recent decision involving the scope of the *Simmons* rule, the plurality noted that "[t]o demonstrate Ramdass' evil character and his propensity to commit violent acts in the future, the prosecutor used Ramdass' prior criminal conduct, supported in some cases . . . by evidence in the form of resulting jury verdicts." *Ramdass*, 120 S. Ct. at 2122. The prosecution in petitioner's case did exactly the same thing, omitting only the phrase "future dangerousness" to characterize its future dangerousness case.

The state's emphasis on petitioner's poor record as a "high-risk" probationer following his earlier felony convictions for criminal sexual conduct and burglary was particularly likely to inject both future dangerousness and parole into the jury's deliberations. The state offered

evidence of petitioner's failure to comply with the rehabilitative conditions of his probationary sentence to show that he did not learn from his mistakes. Such lack of rehabilitative potential was obviously relevant to whether this convicted murderer would likely prove violent in the future. *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (listing defendant's prior narcotics conviction and "failure to attempt to rehabilitate himself" as factors supporting a future dangerousness finding). Moreover, the presentation of detailed evidence about petitioner's previous probationary sentence was likely to raise in the jurors' minds the question of whether he might again be allowed to serve part of his sentence outside of prison. While the difference between probation and parole may be clear enough to lawyers, there is no reason to think that it is equally clear to jurors. The state's injection of probation into petitioner's sentencing hearing was much more likely to raise the issue of future release than anything that the prosecution did or said in *Simmons* itself. It also made it all the more probable that the jury would focus its attention on petitioner's likely behavior if released from prison.

Because South Carolina is a "non-weighing" jurisdiction, petitioner's jury was not required to indicate whether it had drawn any conclusions about his future behavior from the evidence of his past behavior. But the jury's instructions clearly authorized it to draw such conclusions. *See e.g.* R. 1924-25 (court instructs that jury may consider petitioner's prior offenses "as evidence of his character, his characteristics . . . and you may give them whatever weight you deem proper . . . "). And the jury's parole questions strongly suggest that it did.

To be sure, the prosecutor avoided using the term "dangerousness" in his closing argument, presumably because he knew that under *Simmons* too explicit a discussion of dangerousness would doom his efforts to keep the jury in the dark about petitioner's ineligibility for release. But even this semantic restraint all but disappeared when the prosecutor dramatically and repeatedly recalled a witness's videotaped warnings after the shootings that the killers "might come back." Just as in *Simmons* itself, this argument powerfully evoked the jury's fear of future depredations by a killer who has been loosed upon society.

Of course, "they might come back" was a coded rhetorical device rather than a literal description of the danger that petitioner posed in the future. But so was the prosecutor's dangerousness argument in *Simmons*. In that case the prosecutor never used the terms "dangerous" or "dangerousness," nor did he offer any prediction of what the defendant would do in the future if not executed. The sum total of the *Simmons* prosecution's injection of future dangerousness, as summarized both by the plurality and by Justice O'Connor's concurrence, was as follows:

> The question for the jury, the prosecution argued, was "what to do with [petitioner] now that he is in our midst." The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 177. These veiled references to Simmons' dangerousness were just that: *veiled* references. Indeed, two dissenting Justices detected nothing at all in the prosecutor's argument that even referred to Simmons'

future behavior: to the dissenters, the "in-our-midst" passage referred only to Simmons' alleged attempt to blame his crimes on his childhood environment, while the "self-defense" reference was merely an appeal for a calm and dispassionate societal response to Simmons' brutal crimes, rather than a sentence based on anger or emotion. 512 U.S. at 181-82 (Scalia, J., dissenting).

In this case, the prosecutor's haunting evocation of the witnesses' terrified cries that the killers "might come back" was at least as pointed a reference to the defendant's future dangerousness as anything in *Simmons*. Just as in *Simmons*, that argument entitled petitioner to inform the jury that he would not be "coming back" even if the jury spared his life, because under South Carolina law he would never be released from prison if the jury imposed the only non-capital sentencing alternative available to it. And petitioner's right to so inform the jury was all the greater in light of the state's evidence that preceded it – evidence calculated to convince the jury of petitioner's dangerous impulsivity, his imperviousness to rehabilitation while on probation, his anger, and his lack of remorse.

Whether a given question is "in issue" before a jury depends not on the exact phraseology of the parties' closing arguments, but on the evidence presented and the legal framework within which the jury must come to judgment. In this case, the jury was certainly *authorized* to consider 19-year-old Wesley Shafer's likely future dangerousness as a reason to sentence him to death. *See e.g. State v. Woomer*, 299 S.E.2d 317, 319-20 (S.C. 1982). The state did everything it could, short of using the word "dangerousness," to encourage such consideration.

Indeed, if future dangerousness had not been sufficiently "in issue" to trigger the due process protection of *Simmons*, petitioner would presumably have been entitled to an instruction directing the jury not to consider or even discuss the question of his likely future conduct as a reason to sentence him to death.[8] But any attempt to craft an instruction differentiating the *evidence* of petitioner's dangerousness (i.e. his "characteristics" as revealed by his conduct) from the *issue* of his dangerousness would be futile. In this case, dangerousness simply could not have been artificially excluded from the jurors' minds. The evidence and the prosecutor's argument put the issue squarely before them. Moreover, in a non-weighing jurisdiction such as South Carolina, no rule of law limits the jury's reasons for imposing the death penalty on a death-eligible defendant, nor requires the jury to perform the mental gymnastics necessary to segregate the issue of dangerousness from the overlapping issue of character.

In *Simmons*, dangerousness was raised in part (as it was here) by a veiled prosecution argument. But nothing in *Simmons* suggests that *only* the prosecutor's jury argument can inject the issue of dangerousness into a jury's

---

[8] In yet another *Simmons* case now pending on direct appeal in the South Carolina Supreme Court, the defendant requested just such an instruction after the state prevailed on the trial judge to deny a no-parole instruction under *Simmons* on the grounds that the state did not intend to "argue" the defendant's future dangerousness. *State v. William Arthur Kelly*, Record on Appeal at 2108 (Docket No. 200066, S.C. Sup. Ct.) The trial court refused to give the requested limiting instruction, and, as in this case, placed no limitations on the adverse inferences that the jury was authorized to draw from the state's evidence in aggravation.

sentencing deliberations. Indeed, common sense dictates otherwise. The unstructured manner in which juries consider future dangerousness in non-weighing jurisdictions such as South Carolina shows the importance of enforcing the rule in *Simmons* on the basis of the evidence and instructions that guide the sentencing jury to its life-and-death decision, not by the sort of devious rhetorical hair-splitting that the prosecution employed here.

In this case, both the prosecutor's argument and the state's evidence as a whole would logically and naturally have led the jury to consider the practical consequences – and potential dangers – of allowing petitioner to live. *Simmons* therefore entitled him to a fair hearing on that issue, which petitioner could receive only if the jury appreciated the full incapacitative effect of its life imprisonment option. The trial judge's refusal to answer the jury's mid-deliberation question about parole violated the due process rule of *Simmons* and mandates reversal of the death sentence imposed.

CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed insofar as it leaves undisturbed petitioner's sentence of death.

Respectfully submitted,

DAVID I. BRUCK*
ROBERT E. LOMINACK
P.O. Box 11744
Columbia, S.C. 29211
(803) 765-1044

WILLIAM N. NETTLES
914 Richland Street
Suite A-102
Columbia, S.C. 29201
(803) 779-9966

**Counsel of Record*

Attorneys for Petitioner

November 13, 2000.

APPENDIX A

CODE OF LAWS OF SOUTH CAROLINA
1976 ANNOTATED
TITLE 16. CRIMES AND OFFENSES
CHAPTER 3. OFFENSES AGAINST THE PERSON
ARTICLE 1. HOMICIDE

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment

for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a-mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed

to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), § 44-53-375(B), § 44-53-440, or § 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory

aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person

called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

APPENDIX B

STATE LAW GOVERNING JURY INSTRUCTIONS ON PAROLE INELIGIBILITY IN CAPITAL CASES

I. At present, thirty states both employ juries in capital sentencing and provide for life imprisonment without possibility of parole as an alternative to the death penalty. In twenty-seven of these jurisdictions, the trial court expressly informs the jury of the defendant's ineligibility for parole, even where *Simmons* does not require such instructions as a matter of federal due process. A twenty-eighth state has not addressed the issue.

A. Thirteen states identify the jury's sentencing alternatives as death and life without parole.

Alabama: Ala. Code § 13A-5-46(e) (1994)

Arkansas: Ark. Code Ann. §5-4-603(b) (Michie 1997)

California: Cal. Penal Code Ann. § 190.3 (West 1999)

Connecticut: Conn. Gen. Stat. §§ 53a-46a(e)-(g) (Supp. 2000)

Delaware: Del. Code Ann. tit. 11, §4209(a) (1995)

Florida: *In re Standard Jury Instructions in Criminal Cases* No. 87922, 678 So.2d 1224 (Fla. 1996)

Louisiana: La.Code Crim. Proc. Ann., Art. 905.6 (West 1997)

Missouri: Mo. Rev. Stat. § 565.030.4 (1999)

New Jersey: N.J. Stat. Ann. § 2C:11-3(f) (West Supp. 2000)

New Hampshire: N.H. Rev. Stat. Ann. § 630:5 (1996)

New York: N.Y. Crim. Proc. Law § 400.27(10) (McKinney Supp. 2000)

South Dakota: *State v. Moeller,* 616 N.W.2d 424 (S.D. 2000)

Washington: Wash. Rev. Code § 10.95.030 (Supp. 2000).

B. Eleven states allow the jury to specify whether the defendant should or should not be eligible for parole.

Georgia: Ga. Code Ann. § 17-10-31.1(a) (1997)

Indiana: Ind. Code § 35-50-2-9 (1998)

Kentucky: Ky. Rev. Stat. Ann. § 532.025(3) (1999)

Maryland: Md. Ann. Code, Art. 27, § 413(c)(3) (Supp. 2000)

Mississippi: Miss. Code Ann. § 97-3-21 (2000)

Nevada: Nev. Rev. Stat. § 175.554(2)(c)(2) (1996)

Ohio: Ohio Rev. Code Ann. § 2929.03 (1999)

Oklahoma: Okla. Stat. Ann. tit. 21, § 701.10(A) (Supp. 2001)

Oregon: Or. Rev. Stat, § 163.105 (Supp. 1998)

Tennessee: Tenn. Code Ann. §§ 39-13-204(a)-(f)2 (Supp. 2000)

Utah: Utah Code Ann. § 76-3-207(4) (1999).

C. Two states require the sentencing jury be specifically instructed in all cases that the defendant will be ineligible for parole if sentenced to life imprisonment.

North Carolina: N.C. Gen. Stat. §15A-2002 (1999)

Virginia: Va. Code Ann. § 19.2-264.4 (Michie 2000)

D. One state requires the sentencing be instructed that the defendant will be ineligible for parole whenever such an instruction would be accurate under state law.

Illinois: People v. Gacho, 522 N.E.2d 1146, 1166 (Ill. 1988).

E. One life-without-parole state has not considered whether jurors should be instructed that the defendant is ineligible for parole under state law.

Wyoming: Wyo. Stat. §§ 6-2-101(b), 7-13-402(a) (1999)

F. Two life-without-parole states inform the jury of the defendant's ineligibility for parole only to the extent deemed necessary under *Simmons*.

Pennsylvania: *Commonwealth v. Chester,* 733 A.2d 1242 (Pa. 1999)

South Carolina: *State v. Southerland,* 524 S.E.2d 833 (S.C. 1999), *but see State v. Shafer,* 531 S.E.2d 524 (S.C. 2000) (holding *Simmons* inapplicable to cases tried under amended South Carolina sentencing scheme).

II. Two states which do not have life imprisonment without parole as an alternative to the death penalty nevertheless inform the jury as to the length of time the defendant must serve before becoming eligible for parole.

New Mexico: *Clark v. Tansy,* 882 P.2d 527 (N.M. 1994)

Texas: Tex. Crim. P.Code Ann. § 37.071 (West 1999)

III. In five states the capital sentencing decision is made by the trial judge alone or by a sentencing panel of judges.

Arizona: Ariz. Rev. Stat. Ann. § 13-702(B) (Supp. 1999)

Colorado: Colo. Rev. Stat. § 16-11-103(1)(a) (2000)

Idaho: Idaho Code § 19-2515(d) (Supp. 2000)

Montana: Mont. Code Ann. § 46-18-301 (1999)

Nebraska: Neb. Rev. Stat. § 29-2520 (1995).